Case No. 82-5909

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

ANTHONY RAY PEEK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL
STATE OF FLORIDA

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTION PRESENTED

Whether Florida's procedural rule which denies a death-sentenced defendant the opportunity to present substantial new evidence after trial either towards guilt or sentence, which did not exist and was not available at the time of trial, unless the Florida Supreme Court first determines that the new evidence would "conclusively" have prevented the conviction, violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution?

OPINION BELOW

The opinion and Judgment of the Supreme Court of Florida correctly appears in Appendix A-46 of the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

Respondent does not question the jurisdictional statement as stated in the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOKED

Respondent does not question the constitutional provisions cited in the petition.

STATEMENT OF THE CASE

Respondent accepts the statement of the case as set out in the petition except that it denies that ". . . [t] he request was accompanied by two pieces of substantial new evidence, neither of which existed at the time of trial, and which substantially altered the weight of the evidence against Petitioner "and further denies that if petitioner". . . is permitted to present this new evidence, neither the judgment nor sentence could stand."

STATEMENT OF THE FACTS

Respondent cannot accept the Statement of Facts as set out in the petition inasmuch as it contains argumentative statements such as that the fingerprint was the only positive evidence linking petition to the victim, that the hairs were probably mixed up, that the comparison incorrectly done and that the statistics were grossly in error. Instead, as to the facts leading to the conviction, Respondent will adopt those as appear in the Florida Supreme Court's opinion reported at 395 So. 2d 492 (Fla. 1980).

> "Erna L. Carlson returned to her home in Winter Haven, Florida, following a visit with relatives at approximately 9:00 p. m. on May 21, 1977. At 8:30 a. m. the following morning, Mrs. Carlson's body was discovered in her bedroom with her robe and part of a bedspread tied tightly around her neck. The screens on the door to the porch and on the door leading from the porch to the house had been cut, and a piece of stocking containing a strand of negroid hair was found in the garage. The victim's pajama bottoms contained blood and seminal fluid stains. No fingerprints were found in the house.
>
> On May 22, 1977, police located Mrs. Carlson's automobile at a lakeside park approximately one mile from her home. The door to the driver's side was locked, the passenger door was not. The keys to the automobile were in the glove compartment. Fingerprints were found on the inside of the driver's side window.
>
> Prompted by allegations that Peek had been going door to door seeking employment in the Winter Haven area, Officer Donnelly of the Winter Haven Police Department interviewed him several days

after the murder. Appellant lived in a supervised halfway house at the time of the crime. He told Donnelly that he had returned to the halfway house before 11:00 p.m. on the night of May 21, 1977 and had not been in the vicinity of Mrs. Carlson's home or of the lakeside park. Appellant voluntarily permitted the taking of his fingerprints and the extraction of hair samples.

Appellant was tried in the Circuit Court for Polk County on April 10, 1978. Dr. Luther Youngs testified that Mrs. Carlson died of strangulation. She also had been raped and suffered two fractured ribs. An employee from the Sanford Crime Lab testified that the hair samples obtained from appellant were consistent in microscopic appearance to the hair found in the stocking at the scene of the crime. Although it is never possible to say that two hairs are identical, the hairs of only approximately two out of every 10,000 persons exhibit consistent microscopic characteristics. The blood and seminal fluid stains taken from an individual with type O secretor blood; appellant is a type O secretor. The evidence further revealed that the fingerprints found inside Mrs. Carlson's car matched those of appellant.

Appellant took the stand and, with one significant exception, reiterated the account first given to Officer Donnelly. He contradicted, however, his prior assertion that he was not in the area where the victim's car was found on May 22, 1977. Appellant testified instead that on that morning he rode his bicycle to the lakeside park. Noticing a car parked nearby with the door unlocked, he opened the door and searched the glove compartment, after which he rode his bicycle back to the halfway house."

As to the facts pertaining to his application for leave to file an application for Writ of Error Coram Nobis, Respondent denies that the alleged newly discovered evidence . . ."totally destroy[ed] the hair evidence and probability statistics presented at trial," that petitioner can now show probable tampering with the evidence or that the basis of the expert's testimony has now been discredited. These were allegations made by the application for Writ of Error Coram Nobis, not established facts.

REASONS FOR DENYING CERTIORARI

Petitioner assumes that the reason the Florida Supreme Court denied his application for leave to file a Petition For Writ of Error Coram Nobis in the trial court was that court's decision in Hallman v. State, 371 So. 2d 482 (Fla. 1979), but since the Florida Supreme Court denied the application without an opinion that assumption is purely speculative. The application may have been denied not because the alleged newly discovered evidence was not conclusive, but because the evidence was not newly discovered as defined by the Florida Supreme Court or because it failed to meet even a probability test. Consequently should this Court grant certiorari it could not decide the question presented because there is no way for the Court to determine whether that question was even decided by the Florida Supreme Court in denying the application.

Even assuming the Florida Supreme Court did deny the application for permission to petition for a Writ of Error Coram Nobis on the basis of Hallman v. State, supra, this Court should not grant certiorari.

In Hallman, the Florida Supreme Court held that an application for permission to petition the trial court for a Writ of Error Coram Nobis will be denied unless the petition alleges facts, which if true, and known at the time of the trial would have conclusively prevented entry of the judgment and or sentence. Petitioner does not like this rule and is asking this Court to change Florida's rules pertaining to Coram Nobis. With deference, we find it hard to believe that even this Court has the authority to tell the State of Florida what it's rules should be.

We recognize that where a judgment is obtained or a sentence imposed in violation of the constitution this court has authority to set aside that judgment or sentence. But petitioner does not claim his judgment or sentence was obtained in violation of the constitution. His claim is that Florida is denying him the opportunity to present new evidence. If this Court were to grant certiorari and determine that it did not like Florida's Coram Nobis rule, then what remedy? Will the Court invalidate the judgment or sentence without a hearing to determine the truthfullness of the allegations or will it order the Florida Supreme Court to grant permission to apply for a Writ of Error Coram Nobis under a lesser standard ?

We have no doubt that this Court has the power to order

either remedy. We do suggest, however, that for the Court to exercise it's powers to the point of telling a state what standards to apply in allowing access to it's courts would be unprecedented and unwarranted.

CONCLUSION

For these reasons the Petition For Writ of Certiorari should be denied.

Respectfully Submitted,

JIM SMITH
ATTORNEY GENERAL

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

CERTIFICATE OF SERVICE

I CHARLES CORCES, JR., a member of the bar of the Supreme Court of the United States hereby certify that a true and correct copy of the foregoing has been furnished by U. S. Mail to: Mr. Edward S. Stafman, Esq., 224 West Fourth Avenue, Tallahassee, Florida, 32303, on this 7th day of January 1983.

OF COUNSEL FOR RESPONDENT